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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 493

NATHAN SHAVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–10a) is reported at 320 F. 2d 308.

JURISDICTION

The judgment of the court of appeals (Pet. 11a) was entered on July 2, 1963. A petition for rehearing was denied on July 26, 1963. On August 20, 1963, Mr. Justice Goldberg granted an extension of time for filing a petition for a writ of certiorari to and including September 25, 1963. The petition was filed on September 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government failed to credit petitioner with business expenses to which the record shows he was entitled.

2. Whether the trial court abused its discretion in refusing to admit an expert's summaries on the ground that they were based upon unwarranted assumptions.

3. Whether the government sufficiently corroborated admissions made by petitioner in a list of fees which he voluntarily gave to the Revenue Agent.

4. Whether the trial court abused its discretion in denying as untimely a motion to suppress made on the second day of trial, eight months after the return of the indictment, where the defendant was afforded a full opportunity to show the timeliness of the motion.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

> Rule 41
>
> SEARCH AND SEIZURE
>
> * * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in in its discretion may entertain the motion at the trial or hearing.

* * * * *

STATEMENT

On March 30, 1961, an indictment was returned in the United States District Court for the Northern District of Illinois charging petitioner with wilfully and knowingly attempting to evade and defeat a large part of the income tax owed by him and his wife for

the years 1954 and 1955, in violation of Section 7201 of the Internal Revenue Code of 1954 (R. 1, 4–5).[1] Count One charged that he filed a false and fraudulent income tax return with his wife in which he understated their joint net income by $29,638.12 for the year 1954, and wilfully attempted to evade and defeat $16,892.78 in income taxes due for that year. Count Two charged that he failed to report $66,421.54 of joint net income for 1955 and wilfully attempted to evade and defeat $43,365.38 of income tax for that year.

Petitioner was tried before a jury and found guilty as charged (R. 512). He was sentenced to imprisonment for eighteen months on each count, the sentences to run concurrently, and fined a total of $5,000.00 (R. 522–524). The pertinent facts are as follows:

Petitioner is an attorney in Chicago, Illinois, specializing in the representation of plaintiffs in personal injury cases (Pet. 4). In his income tax returns for 1954 and 1955 petitioner admitted gross receipts in the respective amounts of $216,106.66 and $240,926.76 (Pet. 5). On November 9, 1956, Revenue Agent Marseille was assigned to examine his returns (R. 22–23). On March 11, 1957, petitioner voluntarily gave the agent a list of his fees for the years 1953, 1954 and 1955 (R. 23–25), showing the amount of each fee and the client and case from which it was received (R. 96). The totals on the lists were virtually identical to those on the tax returns (R. 97). Further investigation of the records of the Municipal

[1] Citation is to the printed Appendix in the court of appeals which is on file with the Clerk of this Court.

Court of the City of Chicago and of insurance companies revealed that petitioner had received fees in 1954 and 1955 in cases not shown on the lists. Neither the amount of these fees nor the names of the clients appeared on the lists (R. 100). From the testimony of these clients at the trial the jury could have found that the fees they paid petitioner resulted in additional, unreported net income in the amounts of $28,104.50 and $61,063.91 for the years 1954 and 1955, respectively (R. 137–161, 170–171, 193–194, 196–215, 216–219, 222–224, 227–234, 244–260, 261–264, 265–282, 283–287, 305–309, 322–324, 339–344). The unpaid income tax on these amounts totaled $15,941.93 for 1954 and $39,393.07 for 1955 (R. 342, 344).

ARGUMENT

1. Petitioner's first contention (Pet. 15–19) is that the court of appeals erred in holding that the government established a *prima facie* case by proving specific items which were not reported as income. He contends that the government was required "to develop and calculate other known business expense deductions," citing *Elwert* v. *United States*, 231 F. 2d 928, 933 (C.A. 9), where the court said:

> * * * it must be remembered that in a tax evasion case the burden is on the defendant to prove that he had allowable deductions which were not shown in his return once the Government establishes unreported income and allows the deductions claimed by the defendant in his return and others that it can calculate without his assistance.

Assuming that *Elwert* represents a correct statement of the government's burden,[2] the decision below presents no conflict for review by the Court for there is no evidence of any unclaimed deductions nor any basis in the record for the contention that the government had uncovered facts from which it could have calculated such deductions. As the court below pointed out, the evidence to which petitioner refers consists of expenses "placed under the heading 'office' in the cash disbursement books * * * regardless of whether they were personal expenses or office expenses" (Pet. 4a).[3] The record in turn establishes that all the deductible items in the "office" column were totalled at the time petitioner's income tax returns were prepared and included as expenses claimed in those returns (R. 102, 130–131, 136–137, 163–167). Thus, the government's proof is sufficient even if the test stated in *Elwert* had been applied.[4]

2. Also without substance is the contention (Pet. 19–22) that the trial court abused its admitted discretion in excluding the evidence offered by petitioner's "expert," DeLavan. Both his testimony and the sum-

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[2] But see *Swallow* v. *United States*, 307 F. 2d 81 (C.A. 10), certiorari denied, 371 U.S. 950; *United States* v. *Bender*, 218 F. 2d 869 (C.A. 7), certiorari denied, 349 U.S. 920.

[3] See the admissions of petitioner's bookkeeper (R. 161–163).

[4] Petitioner misreads the record when he suggests (Pet. 7, 8, 16, 20) that the agent testified that the expenditures recorded in the "office" column of the cash disbursement books were "acceptable" business deductions. An examination of the record citation (R. 28) discloses that the agent was specifically making reference to figures other than those in the cash disbursement book and that he testified that all of these expenditures were reflected in petitioner's tax return (*ibid.*).

maries he prepared were based wholly upon totals he had made of the "office" column in the cash disbursement books. DeLavan testified that all he had done was to add together the monthly totals of the "office" column as shown by the cash disbursement books, without analyzing or even examining the individual items; that he had proceeded on the assumption that they were all deductible business expenses. He admitted that if any of the items in that column were not deductible expenses his schedule would be incorrect, that some of the entries pointed out to him by the prosecutor did not appear to be business expenses, and that he had made no attempt whatsoever to eliminate personal items from his computations (R. 402–410). The summaries thus tabulated bore no headings, and defense counsel did not even know what they purported to represent (R. 421–425).

As noted, both deductible and non-deductible items were recorded without discrimination in the "office" column and those which constituted valid business expenses had been fully reflected in the petitioner's income tax returns. In these circumstances, it is apparent that the testimony and summaries were meaningless and misleading and properly excluded. *United States* v. *Kiamie*, 258 F. 2d 924, 933 (C.A. 2), certiorari denied, 358 U.S. 909; *United States* v. *Ward*, 169 F. 2d 460, 462 (C.A. 3); cf. *Flemister* v. *United States*, 260 F. 2d 513, 517; *Kirsch* v. *United States*, 174 F. 2d 595 (C.A. 8).[5]

[5] The statement that the trial court's characterization of DeLavan's summaries as "highly unfair" and "misleading" (Pet. 11) occurred in the jury's presence is not correct. The jury had

3. There is no basis for petitioner's contention (Pet. 22–23) that the government failed to corroborate the admissions contained in the list of fees he gave Agent Marseille. It was obviously one of the alleged errors rejected by the court of appeals by the statement (Pet. 10a) that it is "not of sufficient weight to require comment."

Petitioner's tax returns were admissible as admissions, without corroboration. *Warszower* v. *United States*, 312 U.S. 342, 347–348. The amounts of gross receipts reported therein were virtually identical to those on the list given to Agent Marseille (R. 97). In addition, Agent Marseille personally examined and copied petitioner's closed case files for the years involved in which petitioner listed each day, in order of their receipt, the fees received plus the name of each client and the case number (R. 96–98). Although there were discrepancies between the lists and the contemporaneous files as to the total amount of fees,[6] the names of the clients were the same (R. 377–378). We submit that petitioner's tax returns and Agent Marseille's compilation from the closed case files sufficiently corroborated the admissions in the list of fees to satisfy even the requirements of *Smith* v.

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been excused during a long colloquy and was brought in after the court's remarks were made, and after the court had expressed the opinion that DeLavan "was not qualified as an expert" (R. 437).

[6] The closed case files showed $6,236.65 more income for 1954 than shown on the lists, and $780.91 more for 1955 (R. 97–98). In calculating the unpaid tax the government expert accepted the lower figure which petitioner used in his tax returns (R. 342, 344).

United States, 348 U.S. 147, and *Opper* v. *United States*, 348 U.S. 84.

4. Finally, there is no substance to petitioner's contention (Pet. 24–26) that the court abused its discretion in denying as untimely his motion to suppress the list of fees and other materials which he had voluntarily given Agent Marseille at the commencement of the investigation. Petitioner made his motion to suppress on the second day of the trial, eight months after the indictment and some four and one-half years after he had voluntarily given the documents to the agent. His stated grounds were that the document "was procured under circumstances that would not permit its admission because we believe it was not turned over to this witness in precisely the form in which he says it was" (R. 36). The court ruled that before it would consider the merits, petitioner would be given "the fullest opportunity" to show that the motion was timely under Rule 41(e) which requires that it "be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion * * *" (R. 46–47).

In the course of the ensuing proceedings, in which defense counsel examined three witnesses, Agent Marseille, the petitioner and petitioner's associate, Hamilton, he developed nothing to support the stated grounds of the motion but claimed to have discovered for the first time that the agent had been particularly interested in records involving doctor bills which went to the very heart of a then pending mail fraud case against petitioner and that the agent had had a con-

versation with two members of the Intelligence Division of the Internal Revenue Service about four days after petitioner delivered the documents (Pet. 13–14). Petitioner suggests now—and argued vigorously at the time of the motion (R. 86–87)—that the purported discovery of these facts satisfied the requirement of timeliness and entitled him to a full hearing to show that the agent, in active collaboration with representatives of the Intelligence Division, had a dual purpose to conduct a routine inquiry into petitioner's tax returns and also (unknown to petitioner) to attempt to obtain evidence for possible use in connection with the pending mail fraud indictment.

The short answer to these claims is that the court found as a fact that "the defendant was aware of the grounds upon which the motion would be made" (R. 93) and that this finding is supported by the record of the full hearing on the motion (R. 35–93).[7] Further, contrary to petitioner's contention, the court did consider the merits of his claim based upon the facts which he states were newly discovered and found that the suggested improprieties in the search had been

[7] The court pointed out that the defendant taxpayer was a practicing lawyer of 31 years' experience and that he had been represented since the indictment by an accomplished criminal lawyer (R. 90–92). It may also be noted that at the outset of the proceedings on the motion to suppress, defense counsel stated that he wished to examine Revenue Agent Marseille to whom petitioner had given the documents "about the status of the investigation, what he told [petitioner] about the investigation at that time, what the discussion was as to the nature of the routine audit * * *" (R. 36). Further, when the court asked for the cases in support of the motion to suppress, defense counsel cited *United States* v. *Lipshitz*, 132 F. Supp. 519

"explained away" (R. 93).[8] In any event, even if the agent had had a dual purpose to inquire into petitioner's income tax liabilities and to help develop evidence for the pending mail fraud case, this would not constitute an invasion of petitioner's constitutional rights. *United States* v. *Wheeler*, 275 F. 2d 94, 97 (C.A. 3), certiorari denied, 363 U.S. 828, reversing *United States* v. *Wheeler*, 149 F. Supp. 445 (W.D. Pa.), relied upon by petitioner at Pet. 25, n. 19.

(E.D.N.Y.) and *United States* v. *Wheeler*, 149 F. Supp. 445 (W.D. Pa.)—the same cases on which he now relies (Pet. 25 n. 19)—for the proposition that "The special agent working in what is known as a joint investigation, worked with the regular revenue agent, and it was said by the court that that was obtainment of things and under circumstances that violated the privilege against furnishing evidence for criminal purposes which the defendant, the taxpayer, had" (R. 43). These statements by defense counsel all occurred prior to the purported discovery of the new facts (see R. 52–53).

[8] It is true that the agent and his superior had one brief conversation with two special agents early in the investigation in March 1957, but those agents stated that they were not interested in the case (R. 65). When the government attempted to show that there had been no further contact between the investigating agent and the Intelligence Division between March 1957, and June 4, 1957 (when that Division entered the case—R. 50), the defense objected and the testimony never went in. In cross-examining the agent, the defense did not touch upon the subject of any such later contacts (R. 65–66).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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